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DELIVERED BY THE HONOURABLE MR.JUSTICE G.S.M.GREEN CHIEF JUSTICE OF TASMANIA TO THE ANNUAL MEETING OF THE MARITIME LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND AT HOBART ON THE 13TH OCTOBER 1978

TERRORISM AND THE LAW OF PIRACY

Although piracy is not as popular a maritime activity as it used to be say in the 17th century it is a misconception to think that the only pirates to be found in the twentieth century are those who appear in films of the kind in which that well-known Tasmanian, Errol Flynn, seemed to enjoy acting so much. During the last 60 years old-fashioned piracy - by which I mean the seizure of ships on the high seas for purely material gain - has been, and is to some extent still being carried on in a number of different parts of the world.

Since the First World War pirates operating in the China Sea have been responsible for the loss of scores of vessels and hundred of lives. Last year in or near the Nigerian Ports of Calabar, Port Harcourt and Lagos a number of attacks were made on foreign shipping by pirates in motorised dugout canoes. The worst was an attack on the Danish ship the "Lindinger Ivory" in which cargo was plundered, many members of the crew were injured and the captain was killed. Less well-known outbreaks of piracy occurred in the 1920's in the Black Sea in the wake of the Russian Revolution and amongst the rum ships which as a result of prohibition traded outside territorial waters off the Eastern seaboard of the United States.

But it is not piracy in that traditional sense that I wish to make the primary subject of this discussion although it is included in its scope. What I particularly wish to direct your attention to are some aspects of the piratical activities of an even more dangerous product of our times - the political terrorist.

Piracy is made a crime by the municipal law of most countries but its definition varies from country to country.

The British notion of piracy covers a wide range of activities some of which would not usually be considered as being

included within the term. At first it was restricted to certain crimes of violence committed at sea but by a series of statutes starting with the enactment intituled "An Act for the More Effectual Suppression of Piracy" passed in 1698 piracy was extended to include certain kinds of mutiny, the giving of aid to pirates and the piratical acts of British Privateers - that is those who purported to be acting under the authority of foreign letters of marque or foreign commissions. In 1824 piracy was extended so as to include the carrying of slaves on the high seas.

Piracy is also recognised as a crime by international law. But it is important to note at the outset that the meaning of piracy under international law is not co-extensive with the meaning which it has under municipal law although some States have incorporated the international law definition as part of their own.

The international law of piracy constitutes an exception to the general prohibition against interference by States with ships flying the flags of other States and it also constitutes an exception to the general principle that the object of international law is to regulate the legal relationships of States rather than those of individuals. It used to be thought that because there was no international naval force which could be used for the apprehension of pirates and as there was no international criminal court in which to try them it was inappropriate to talk of piracy as part of the law of nations. But the conceptual difficulties were overcome by the recognition of the high seas as the domain of all countries and in due course it became accepted that all States had the right to board and seize pirate ships and all States were invested with the jurisdiction to try and to punish pirates. The general right to arrest and try pirates bears some similarity to the old notion of outlawry in that: "as the scene of the pirate's operations is "the high seas, which it is not the right or duty of any nation "to police, he is denied the protection of the flag which he "may carry, and is treated as an outlaw, as the enemy of all "mankind - hostis humani generis - whom any nation may in the "interests of all capture and punish". (1)

Until 1958 the definition of piracy under international law was uncertain because it had to be found in judicial statements, in academic writings and in particular international declarations and agreements which touched some aspects of piracy but did not cover the field. But in that year the Geneva Convention on the High Seas was adopted by the United Nations Conference on the Law of the Sea and was subsequently ratified by the great majority of sea powers. As the Convention recites that the parties to it desired to "codify the rules of inter-"national law relating to the high seas" it may be taken as generally declaratory of the relevant principles of international law. Although the Geneva Convention thus achieved the convenient result of providing a single authoratitive source of the law in the field unfortunately it did not achieve certainty.

By Article 15 the Convention defines piracy in these terms:-

> "Piracy consists of any of the following acts:
> " (1) Any illegal acts of violence, detention
> " or any act of depredation, committed for
> " private ends by the crew or the passengers
> " of a private ship or a private aircraft,
> " and directed:
> " (a) On the High seas, against another ship
> " or aircraft, or against persons or property
> " on board such ship or aircraft;
> " (b) Against a ship, aircraft, persons or
> " property in a place outside the
> " jurisdiction of any State;
> " (2) Any act of voluntary participation in the operation
> " of a ship or of an aircraft with knowledge of facts
> " making it a pirate ship or aircraft;
> " (3) Any act of inciting or of intentionally facilitating
> " an act described in sub-paragraph (1) or sub-
> " paragraph (2) of this article."

In my view this definition is unsatisfactory because in at least three apsects it is either uncertain or unduly restrictive.

The first difficulty arises out of the proviso that in order for acts of violence, detention or depredation committed on the high seas to constitute piracy they must be committed for

private ends. This proviso is open to criticism on two grounds. First, it is uncertain in its scope and secondly it is strongly arguable that its effect is to exclude from the operation of the Convention the depredations of politically motivated terrorist organisations. And yet the record of such organisations in relation to aircraft hi-jacking demonstrates that they are capable of presenting a considerable potential threat to shipping and are therefore the very kinds of people whom we ought to ensure are brought within the scope of the law of piracy.

A second difficulty arises out of the requirement that the act is required to be illegal. As there is no single coherent body of international criminal law and as there exists no definition of what constitutes criminal or unlawful conduct which is common to all municipal systems it is impossible to define the term with any certainty. The suggestion that for the purposes of the Convention an illegal act is one which is committed without the authority of a State is in my view unpersuasive because such a construction would have the effect of rendering otiose the other proviso which also appears in Article 15 that for an act to be piracy it must be committed for private ends. The Greek delegates to the Conference at which the Convention was discussed recognised the difficulties inherent in the use of the word "illegal" and sought to delete it but their amendment was lost.

The third defect of the Convention is that although there is no unanimity as to the proper construction of Article 15 it is generally thought that it applies only to acts of violence directed to a ship or its passengers which originate from another ship. If that is the correct view then the seizure of a ship by anyone on board would not be piracy.

A number of undesirable consequences flow from these defects. The first and most obvious is that certain kinds of international criminals can sometimes operate unhindered on the high seas because if they are not pirates they are not amenable to the general jurisdiction of all countries and those countries which would have jurisdiction to deal with them may not wish to exercise that jurisdiction or because of inadequate military forces they may not be able to exercise that jurisdiction

Secondly, uncertainty as to what acts are piratical could result in States disagreeing as to whether the seizure of an alleged pirate vessel in a particular case was lawful and could thus provide a potential source of international tension and conflict.

Thirdly and conversely, uncertainty in the law of piracy allows governments to use the word "piracy" as a convenient epithet to condemn all sorts of activities at sea for the purpose of justifying and giving some colour of authority to what, if the law were clear, would be obviously illegal acts of seizure and political retribution on the part of those governments.

The defects in the Convention were well summed up by Professor Crockett of Indiana University in these terms:-

> "The effect of the 1958 Geneva Convention has been "to confuse the law of piracy. Perhaps it is not "unreasonable to suggest that piracy has been rendered "a dead letter. At any rate, it is doubtful that "States will act except in rare situations on the "basis of a right of jurisdiction based upon piracy.
>
> " Obversely, the danger is that the obsolescence of "piracy will be marked by an increase in the commission "of illegal acts of violence on the high seas. Piracy "was traditionally an effective deterrent. Under the "Geneva formulation, piracy can hardly be viewed as a "deterrent at all in view of the fact that it is "apparently directed only at offenders who resemble "the classic pirate of children's books." (2)

The practical effect of these defects can be illustrated by recalling what has become known as the "Santa Maria" incident.

In January 1961 the S.S. "Santa Maria", a Portugese ship, was on a Carribean cruise with passengers of a number of nationalities on board. The vessel stopped at several ports in Venezuela and each time a small group of new passengers boarded the ship. On January 22nd these new passengers formed themselves into a group which took over the ship by armed force, killing one officer and imprisoning the captain and several members of the crew. This combination of murder, kidnapping, hi-jacking and violence on the high seas would in the eyes of the ordinary man certainly qualify as piracy. But because Captain Galvao, the leader of the group, described his followers as revolutionaries whose only purpose was to secure the overthrow of Dr. Salazar as President of Portugal and because the seizure was not effected from another ship many academic writers have doubted whether in fact it was piracy. Although it certainly appears to me that such doubts are well-founded I do not pretend to have the expertise in this area of the law to express a firm view about the question. But my point is that the mere fact that there is room for debate about whether or not such an episode of terrorism can be characterised as piracy demonstrates what an unsatisfactory state the law is in. That the debate about the issues raised by the "Santa Maria" incident is of practical and not merely academic interest is shown by the fact that it is not an isolated case.

In February 1963 the Venezuelan cargo ship "Anzoategui" was seized by members of a communist action group called "The Armed Forces for National Liberation" who had stowed away and who were dedicated to overthrowing the government of Venezuela.

In March 1970 the American freighter "Columbia Eagle" whilst en route to Thailand with a cargo of munitions was captured and sailed to Cambodia by members of an Anti-Vietnam war group.

In February 1974 Palestinian sympathisers describing themselves as Moslem International Guerillas seized a Greek freighter and threatened to blow it up and kill 2 crewmen they were holding as hostages unless their demands were met.

In September 1975 a group of 30 Moro National Liberation Front rebels seized a Japanese freighter off the Southern Philippines.

All of these seizures were committed in circumstances which any civilised society would condemn as criminal but like the "Santa Maria" incident it is doubtful whether any of them could be characterised as piracy.

I assume that the reason why little has been done with a view to overcoming the defects of the 1958 Geneva Convention is that although there have been a few instances, relatively speaking terrorist activities have not so far greatly affected shipping. But can we be confident that that situation will remain unchanged?

Changes in administrative practices and amendments to municipal laws and international agreements have made the hi-jacking of aircraft less attractive to terrorists and the incidence of such seizures appears to be diminishing as a result. But unfortunately, although those measures have reduced hi-jacking, they have not eradicated the hi-jackers and bearing in mind the ingenuity, the financial resources and the amorality of many politically motivated terrorist groups I suggest that we cannot reject out of hand the possibility that some time in the future they might be tempted to turn their attention to shipping to a greater extent than they have in the past.

One way in which modern ships could be regarded as attractive targets by terrorists arises out of their potential use as gigantic weapons in themselves. For example, in order to gain compliance with their demands terrorists could threaten to remotely detonate mines attached to a hi-jacked oil tanker or a carrier of nuclear fuel in the vicinity of a coastal area. An even more serious threat would be presented by the possibility of a remotely-controlled detonation of mines attached to a hi-jacked ship carrying liquid petroleum gas or even worse, liquid natural gas. As L.N.G. is usually stored at a temperature and pressure which reduce the gas to 1/600th of its volume the consequences of

a rupture of a gas container and the ignition of its contents are catastrophic. Recent demonstrations of just how catastrophic such explosions can be have been provided by accidents involving road tankers carrying liquefied gas. But there have been other cases. In 1944 in Cleveland, Ohio, a storage tank of L.N.G. split and the contents entered the drainage system and eventually ignited causing the death of 125 people and the devastation of 30 acres of the city. In 1974 the L.P.G. carrier "Yuyu Maru" collided with a Liberian freighter and the gas ignited. If the carrier had not been towed out to sea and bombed it has been estimated that it would have burnt for months. Some indication of the intensity and destructive potential of such a fire is given by the estimate made by Professor Fay of M.I.T. that the radiant heat alone from a fire on an L.N.G. carrier would be sufficient to produce third degree burns at a distance of over a mile. If the estimate that by 1980 up to 150 ships are expected to be carrying liquefied gas throughout the world is at all reliable the implications of even a remote possibility that such vessels might become targets for terrorists deserve serious attention. (3)

During the last fifteen years a number of measures have been taken with a view to rendering more effective international arrangements and laws relating to air piracy which could well provide some useful indications of the kinds of measures which I suggest are required in relation to piracy on the high seas. These have included the Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo in September 1963; The Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague in December 1970; The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation signed at Montreal in September 1971 and the European Convention on the Suppression of Terrorism which has been signed by 17 member States of the Council of Europe since it was opened for signature on 27th January 1977. Broadly speaking the most significant consequences of these conventions have been to clarify and extend the jurisdiction of contracting States over offences committed on board aircraft, to reduce restrictions upon the extradition of political offenders and to

impose a duty upon States to either extradite or prosecute offenders who are within the scope of those conventions and who are within the jurisdiction.

Although some extensions of the powers of States to police the high seas have recently been effected by particular agreements relating to matters such as fisheries regulation and pollution control, I am not aware of any movement towards reform of the international law of piracy on the high seas corresponding to that which has occurred in relation to aircraft. A part of the Third United Nations Conference on the Law of the Sea is concerned with the law of the high seas and Articles 101-111 of Part VII of what is called the Informal Composite Negotiating Text which is being discussed at that conference deals with piracy. But except for some additional provisions relating to drug trafficking and unauthorised broadcasting from the high seas and some changes to the law relating to hot pursuit the Negotiating Text virtually does no more than reproduce the Articles of the 1958 Geneva Convention relating to piracy on the high seas. In particular the definition of piracy contained in Article 101 of the Negotiating Text is in identical terms to the definition appearing in Article 15 of the Geneva Convention. I understand that the repression of piracy may be the subject of a further treaty after negotiation in a forum such as the International Maritime Consultative Organisation but no concrete steps have been taken to that end.

It may be that in developing the theme of this address some might think that I am being a pessimistic alarmist. But in considering whether or not that would be a fair judgment let us pretend for a moment that this is not a meeting of the Maritime Law Association being held in 1978 but a meeting of the Air Carriers Law Association being held early in 1958. The position at that time was that no aircraft had been hi-jacked in 1957, one plane had been hi-jacked in 1956, none had been hi-jacked in 1955, none in 1954 and only one in 1953. In the light of that experience, or rather lack of experience, a gloomy guest speaker who suggested that the hi-jacking of aircraft on a

large scale was a serious possibility would have been met with scepticism. But as it turned out of course in that year 7 planes were hi-jacked, 7 more were hi-jacked in 1959, 8 were seized in 1960 and thereafter the number of such incidents increased each year until in 1969 planes were being hi-jacked at the incredible average rate of one every four days.

Apart from surrendering to them there are only two responses one can make to terrorist activities. The first, which has many adherents and which has some respectability because it is analogous to the right of individuals or societies to use violence for the purpose of self-defence or in the prosecution of a war, involves the employment of extra legal measures such as the suspension of civil rights, the investing of police and security officers with special powers and the drum head court martial. A precedent for such a response is provided by an old rule of the English law of piracy that:-

> " (If) Piracy is attempted on the Ocean, (and)
> "the Pirates are overcome, the Takers may immediately
> "inflict a Punishment, by hanging them up at the Main-
> "yard End; though this is understood where no legal
> "Judgment may be obtained: And hence it is, that if a
> "Ship shall be on a Voyage to any Part of America, or
> "the Plantations there, on a Discovery of those Parts;
> "and in her Way she is attacked by a Pirate, but in
> "the Attempt the Pirate is overcome; the Pirates may be
> "forthwith executed, without any Solemnity of Condemnation,
> "by the Marine Law." (4)

For reasons which I am sure I do not need to elaborate in this forum, in the long term such measures are self-defeating because they involve the sacrifice of those very characteristics of our society, such as the rule of law, which make it worth defending against terrorist attacks. But whilst there exists a partial vacuum in the law relating to crimes committed on the high seas of the kind to which I have referred in this address support for such a response is understandable.

The other response that we can make to terrorist activities is to fill that vacuum and apply the notion of the rule of law to the law of nations to a greater extent than is presently the case. I submit that one way of achieving that would be by reforming the law of piracy.

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